

ETHICS COMMITTEE

DATE: November 12, 2009

CALLED TO ORDER: 6:00 p.m.

ADJOURNED: 6:57 p.m.

ATTENDANCE

ATTENDING MEMBERS

Ginny Cain, Chairwoman
José Evans
Robert Lutz
Brian Mahern
Kent Smith

ABSENT MEMBERS

Mary Moriarty Adams

AGENDA

Continuation of discussion of possible procedures for the Ethics Committee

ETHICS COMMITTEE

The Ethics Committee of the City-County Council met on Thursday, November 12, 2009. Chairwoman Ginny Cain called the meeting to order at 6:00 p.m. with the following members present: Robert Lutz, Brian Mahern and Kent Smith. José Evans arrived shortly thereafter. Absent was Mary Moriarty Adams. General Counsel, Robert Elrod, represented Council staff.

Chairwoman Cain said that the Committee is continuing to look at the draft of the procedures for the investigation of allegations of violations of ethical standards for City County Councillors (attached as Exhibit A). She asked the members of the Committee to introduce themselves.

Mr. Elrod said at the request of the Committee, he changed Sec. 151-1121 (a) to reflect that the allegations of violations are either made during committee or Council meetings or made by other Councillors. He said that he also clarified sub-section (d) to define who shall fulfill the duties of the Ethics chairperson if the chairperson is the respondent or complainant of the allegation. Mr. Elrod read sub-section (e), and said that one of the words "respondent" should be changed to "complainant."

Mr. Elrod said that there were only a few clerical changes in Sec. 151-1122. He said he cleaned up the timeline in Sec. 151-1123. He read through the section and stated that sub-section (b) may need to be modified to state "after the alleged violation is filed" instead of when it occurred, in case the allegation is filed late. Mr. Elrod continued reading the draft through Sec. 151-1124. He said that Sec. 151-1124 (e) has been added, and addresses the concern about how to keep the alleged violation confidential. He said that this complies with the open door law, as personnel matters may be made confidential by actions of the body which reviews personnel matters. However, the fact that the allegation has been made cannot be kept secret. Mr. Elrod said that he believes that if the allegation is revealed, then the person against whom the allegation is filed must also be revealed. He explained that the language in the open door law states that if action is contemplated against an employee, then the fact that the action is contemplated must be disclosed. He said there may be an issue if it becomes known that the Committee has been called to investigate an allegation, yet it has not been disclosed who the allegation is against.

Councillor Mahern asked if the law requires that the allegation be disclosed publicly. Mr. Elrod said that the statute actually states that it requires public access to information relating to the status of formal charges against an employee. He said again, the question is whether or not formal charges can be disclosed against an employee without revealing the identity of the employee. Chairwoman Cain asked if Mr. Elrod will look into that and provide the Committee with the answer to that question or if it is a case law thing. Mr. Elrod said that it is a matter of what the statute states.

Councillor Mahern asked if someone files a complaint with the Clerk, and the complaint is not filed at a committee or Council meeting, if that action must be disclosed. He

asked if there is some kind of preliminary review that can be done by the Ethics Committee that would trigger whether or not the complaint will be a formal charge. Mr. Elrod answered that the way this is set up, that would trigger a process of an executive session of the Ethics Committee to review the complaint. He said the question is what has to be disclosed regarding that complaint. Councillor Mahern said that there could be a complaint that may not be a formal charge. He said the Committee may take actions to review that complaint on a preliminary basis, which could potentially result in a formal charge and then there would be the disclosure. Mr. Elrod said that he is willing to write this provision however the Committee desires, but he is unsure if that will comply with the law. He said, additionally, notice must be given to the respondent that the process is occurring.

[Clerk's note: Councillor Evans arrived at 6:11 p.m.]

Councillor Lutz said that he believes that the name should be supplied when the allegation is disclosed, but the details of the complaint could still be kept confidential. Mr. Elrod said that he believes keeping the name of the person confidential may cause unwanted attention from the people who enforce the open records law. Councillor Mahern said that it would only be kept confidential until it is determined whether or not the allegation is valid. Mr. Elrod said that he is comfortable that the Committee will comply with the law if they use a statement such as "a complaint has been filed against Councillor X. It has been referred to the Ethics Committee to be heard in their executive session."

Councillor Mahern asked if it is common practice in criminal investigations to disclose a person's name that is being investigated in a case. Mr. Elrod answered that the laws are different in criminal cases, but police officers typically disclose the names of persons who are of interest in a case. Chairwoman Cain said that disclosing the person's name does not state that they are guilty, it only states that there is a complaint.

Chairwoman Cain asked if information must be disclosed if someone requests it from the Clerk. Mr. Elrod answered that certain information could still be kept confidential.

Councillor Mahern said that he believes there is a difference between someone being noted as a person of interest and someone being investigated for a crime. Chairwoman Cain said that this is not a crime. Councillor Mahern said that, however, it is an expectation that the ethical standards are followed, and a person is out of compliance with those standards if they do not follow those standards. He said although this is not a criminal offense, he feels that it carries the same weight. He said that he feels that the Committee should protect as much information as possible until it is absolutely necessary to reveal it. Mr. Elrod said that the way the draft is currently written, only the fact that an allegation has been filed and that the Chair has referred it to the Committee is disclosed. He said the other issue is that it cannot be guaranteed that the person filing the complaint will keep it confidential.

Mr. Elrod said that Sec. 151-1125 details what will happen at an informal hearing. He said that the Committee can discuss an allegation, but there must be an open, public meeting before any action can be taken, whether it is to dismiss the complaint or move forward.

Councillor Mahern asked if the majority decision, as referenced in Sec. 151-1125 (b) refers to a simple majority. Mr. Elrod answered in the affirmative.

Councillor Mahern asked why the records will be maintained if the allegations are dismissed. Mr. Elrod said that public records cannot be destroyed without going through the full process under the public records law. Councillor Mahern asked if there is a reason not to destroy the records if the allegations are unfounded. Mr. Elrod answered in the negative, but stated that there is a statutory procedure for getting permission from the public records law. Mr. Elrod said that the information should be marked "confidential - not for disclosure" and put in a safe place. He said that the Clerk could be directed to get permission to destroy the records if it is deemed necessary. Mr. Elrod said that he will look at the process to destroy records and let the Committee know if it is something that can be done in these types of cases.

Mr. Elrod continued reading through Exhibit A. He said one significant part of Sec. 151-1126 is sub-section (e). He said that Sec. 151-1127 (b) lists six logical sanctions that the Committee may recommend. Mr. Elrod said, with respect to Sec. 151-1128 (a), that depending on the type of hearing, it may just be video taped with transcription done by a court reporter.

[Clerk's note: Councillor Lutz left at 6:25 p.m.]

Chairwoman Cain asked if an appeal is done before the full Council receives the recommendation by the Committee to vote on a sanction. Mr. Elrod answered in the affirmative. He said that the respondent has 10 days from the date of the recommendation by the Committee to appeal to the Council. Councillor Mahern asked how that is materially different than the Council simply hearing the recommendation. Mr. Elrod said that it just puts a formal resolution of the sanction before the Council. Chairwoman Cain asked what happens if the next Council meeting is scheduled less than 10 days from the date of the recommendation. Mr. Elrod said that it should probably be re-worded to state that it be heard at the next Council meeting at least 10 days after the recommendation. Chairwoman Cain asked if it is possible for the recommendation and the appeal to come before the Council at the same time. Mr. Elrod answered in the negative, and referred to sub-section (b).

Mr. Elrod said, with respect to sub-section (c), if the recommendation made by the Ethics Committee is appealed by the respondent, then the recommendation may still show up before the next meeting. However, it can be made clear that there is time for the appeal process if requested. Mr. Elrod said that his thought process assumed that the appeal would be filed before the meeting where the Council received the

recommendation report or resolution. He specified a 10-day filing deadline so that the recommendation would not be unresolved for a long period of time. Councillor Mahern asked if sub-section (c) only applies if an appeal is filed. Mr. Elrod answered in the affirmative.

Mr. Elrod said that the full Council will decide whether to have a full hearing again or to review the information that was given at the Ethics Committee. He read through Sec. 151-1128 (d). Chairwoman Cain asked if the hearing would be conducted like a zoning hearing. Mr. Elrod answered that it will be similar to that. Mr. Elrod said that sub-section (e) explains the procedure for a full hearing if requested.

Councillor Evans asked if Sec. 151-1128 (e) (1) is stating that a person other than a Councillor can preside over the hearing. Mr. Elrod said that his thought is that the Council may want to appoint general counsel or another attorney to preside over the hearing if it is going to be a full, evidentiary hearing. However, the Council may also choose a Councillor who has an understanding of courtroom procedures to preside. Mr. Elrod said that this particular sub-section leaves the door open for the president of the Council to make that decision. Chairwoman Cain said that this sub-section may need to be better explained. Councillor Evans said that he understands choosing a Councillor with the understanding of courtroom procedures, but he is unsure about choosing someone other than a Councillor. Chairwoman Cain said that it may be a good idea to make it so that the person presiding over the hearing should be an objective person and not a Councillor.

Councillor Evans said that he would like the language to reflect that the general counsel to the Council may preside over the hearing, but he is not comfortable with an outside person. Councillor Mahern said that this is pretty consistent with how things would be handled in a committee meeting.

Mr. Elrod said that, with respect to Sec. 151-1129 (a), if someone wants to subpoena any records or persons related to the case, that person would have to issue the subpoena to the Ethics Committee and the Committee will have to vote for the subpoena to move forward. Chairwoman Cain asked if it will be by majority vote. Mr. Elrod answered in the affirmative, and stated that the Committee can only act by majority vote. Chairwoman Cain asked if an indecisive vote is a no vote. Mr. Elrod answered in the affirmative. Chairwoman Cain said that may need to be added to the document.

Mr. Elrod said, with respect to sub-section (c), that State Statute does not allow committees to enforce subpoenas, only the Council. He said if someone fails to comply with a committee-issued subpoena, then the Council will vote to go to court to have a judge issue an order to enforce the subpoena. Chairwoman Cain asked if that is what the Code listed in sub-section (c) states. Mr. Elrod answered in the affirmative.

Mr. Elrod said that Sec. 151-1129 (d) should possibly include the words "while the matter is pending before the Council" after the words "any time." He said in the case of sub-section (d) (1), the recommendation can be postponed.

Chairwoman Cain asked if sub-section (d) (2) will only apply if there is a pending criminal investigation. Mr. Elrod answered in the negative. He said that there are other kinds of cases in which a respondent's testimony could be self-incriminating, and could maybe cause the recommendation to be postponed.

Councillor Smith asked if the changes to Sec. 151-1128 (e) (1) can be emailed to the Committee before the next meeting, so that the members may look over the language. Mr. Elrod answered in the affirmative, and stated that he can get all of the changes to the Committee members, so that a resolution can be drafted. Chairwoman Cain asked if there has to be a formal vote from the Committee to have a resolution drafted. Mr. Elrod said that anyone on the Committee can request that the resolution be drafted at any time. He said that he can get the changes to the members and possibly be ready to draft a resolution for the full Council meeting scheduled for November 30, 2009.

Chairwoman Cain asked the Committee clerk for the date of the next Ethics Committee meeting. NaTrina Moffett, committee clerk, answered that the next meeting is scheduled for December 17, 2009. Councillor Smith said that this will allow the Committee to look over the final draft and express any concerns before the actual committee meeting. Councillor Mahern asked if a resolution would be ready to introduce at the November 30, 2009 Council meeting. Mr. Elrod said that he could possibly have a resolution ready for introduction at the December 14 Council meeting. He said that he is not sure that a proposal must be introduced by the end of the year, but it is possible. Chairwoman Cain said that it would be nice to have all of this done by the first of the year, but it is not necessary.

There being no further business, and upon motion duly made, the meeting was adjourned at 6:57 p.m.

Respectfully Submitted,

Ginny Cain, Chairwoman

GC/nsm

DRAFT PROCEDURES
November 12, 2009 (3:07pm)
FOR INVESTIGATION OF ALLEGATIONS OF
VIOLATIONS OF ETHICAL STANDARDS

Sec. 151-1121. Allegations of violations of ethical standards.

(a) Any allegation of violations of the ethical standards of this chapter must be initiated by a Councillor in one of the following manners:

- (1) An allegation by a Councillor of violations of ethical standards by a Councillor during a meeting of the Council or any committee of the Council shall be made by the Councillor stating the allegation which shall be noted in the minutes. No further statement of allegation is required, but the Councillor making the allegation may file a further statement of allegation that complies with Sec. 151-1122,
- (2) An allegation of violations of ethical standards by a Councillor with respect to conduct of a Councillor not during a meeting of the Council or a Council committee shall be made by filing a statement of allegation, that complies with Sec. 151-1122, with the Clerk of the Council.

(b) The allegation shall be referred to the chairperson of the Ethics Committee by the president of the Council if made during a Council meeting, by the chairperson of the committee if made during a committee meeting, or by the Clerk if filed with the clerk.

(c) As used in this division, "Complainant" means the councillor alleging the violation, and "Respondent" means the Councillor against whom the allegation is made.

(d) If the Respondent or the Complainant is the chairperson of the Ethics Committee, the member of the Committee, who has served the longest on the Council, shall fulfill the duties of the chairperson with respect to such statement of allegation.

(e) If a member of the Ethics Committee is the Respondent or the Respondent, such member or members shall recuse themselves from consideration of such statement of allegation. The Committee on Committees shall name another Councillor or Councillors of the Councillor's political party, to serve during the consideration of the statement of allegations.

Sec. 151-1122. Statement of Allegation. The statement of allegation shall contain the following:

- (1) A description of the conduct by the Councillor that is alleged to be a violation of the ethical standards and the standard of conduct that applies,
- (2) The time and place the alleged conduct occurred,
- (3) The names of other persons present when the conduct occurred,
- (4) The full name, address and phone numbers of any persons who provided information the Councillor upon which the statement of allegation is based,

- (5) Any documents which form the basis of the allegation, and
- (6) An affirmation under penalties of perjury that the statement of allegation is true or based on information considered in good faith to be correct.

Sec. 151-1123. Referral of Statement of Allegation.

(a) The Clerk of the Council, within ten days of the filing of the statement of allegation or notation of allegation by a Councillor in the minutes, shall refer the matter to the chairperson of the Ethics Committee. The clerk shall provide copies of the allegation to the members of the Ethics Committee and the Councillor against whom the allegation is made.

(b) The chairperson of the Ethics Committee, shall set a date for an informal review of the matter by the Ethics Committee not later than thirty days after the alleged violation occurred.

(c) The chairperson shall forward the statement of allegation or notation in the minutes to the general counsel, who shall issue an opinion under Sec. 151-1124.

(e) Notice of the action taken by the chairperson shall be given to the Complainant, the Respondent and the members of the Ethics Committee.

Sec. 151-1124. Filings prior to informal review.

(a) After receiving the statement of allegation for review under Sec. 151-1123, the general counsel shall:

- (1) inquire into the facts and law regarding the statement of allegation, and
- (2) issue an opinion on whether the statement of allegations, if true, warrants a formal hearing or does not raise a substantial issue of violation of ethical standards.

(b) The general counsel shall prepare the opinion within the time specified by the chairperson of the Ethics Committee, which shall be not later than 5 days prior to the informal hearing, and deliver copies of such report to the members of the Ethics Committee, the Complainant, and the Respondent.

(c) The Respondent may file a response to such report with the Clerk of the Council which response may include a proposed agreed sanction. Such response shall be forwarded to the members of the Ethics Committee and to the Complainant.

(d) Should the Respondent propose a sanction, the Complainant may file, with the Clerk of the Council, a statement in support or opposition to the proposed agreed sanction.

(e) The statement of allegation, the opinion of the general counsel, and any other documents filed pursuant to this section are deemed information prepared for an executive session on a personnel matter and are hereby determined to be exempted from disclosure under IC 5-15-3-4(b). Upon proper request, the clerk shall disclose that a statement of allegation has

been filed and the action of the chairperson under Sec. 151-1123.

Sec. 151-1125. Informal Hearing.

(a) The Ethics Committee may convene an executive session to deliberate on the statement of allegation and filings under Sec. 151-1124.

(b) The Ethics Committee shall vote on whether or not to proceed with a formal hearing at a meeting open to the public. If the committee cannot reach a majority decision on how to proceed within forty-five (45) days after the executive session, the matter shall be scheduled for a formal hearing before the committee by the chairperson.

(c) If the Ethics Committee agrees to proceed without a formal hearing, it shall either:

(1) Dismiss the statement of allegation for failure to allege a substantial issue of violation of ethical standards, or

(2) Recommend the agreed sanction as proposed by Respondent.

(d) If the Ethics Committee votes to proceed with a formal hearing on the statement of allegation, the hearing shall be scheduled before the committee not later than thirty days after the informal review, unless the Respondent agrees to a later date.

(e) If the committee dismisses the allegations, the information reviewed in executive session shall remain confidential and exempted from public access. If a sanction is recommended or a formal hearing scheduled, the information reviewed in executive session shall not remain confidential and will be available for public access.

Sec. 151-1126. Formal hearing on statement of allegation.

(a) The general counsel shall preside over the Ethics Committee during the formal hearing, but shall have no vote. Ruling of the presiding officer shall be appealable to the committee

(b) Respondent may file a formal response to the statement of allegations, if filed five days before the start of the hearing.

(c) Complainant shall present evidence to support the statement of allegation. Complainant may be represented by counsel employed by Complainant.

(d) Respondent may present evidence in response to Complainant's evidence. Respondent may be represented by counsel employed by Respondent.

(e) The hearing shall be open to the public, and a transcript of the hearing preserved.

Sec. 151-1127. Action after formal hearing.

(a) At the conclusion of the formal hearing, the Ethics Committee shall adopt a

recommendation for the full Council.

(b) The committee may recommend:

- (1) That the Complainant failed to prove Respondent was in substantial violation of the ethical standards, and that no sanction be imposed,
- (2) That sanction be imposed as proposed by the Respondent,
- (3) That the Respondent be censured,
- (4) That the Respondent forfeit council offices or committee assignments,
- (5) That the Respondent forfeit per diem compensations, or
- (6) That the Respondent be removed from office by the council.

(c) If the committee cannot reach a majority decision on the adoption of a recommendation, the matter shall remain pending before the Ethics Committee until a majority adopts a recommendation.

(d) Any recommendation adopted by the Ethics Committee shall be reported in writing to the Council and a proposal for a resolution adopting such recommendation placed on the agenda of the Council at its next meeting.

Sec. 151-1128. Action by council.

(a) Respondent has the right to appeal to the Council any recommendation by the Ethics Committee and request a hearing. Such request shall be filed with the Clerk of the Council within 10 days after the Ethics Committee adopts its recommendation. On filing of the appeal the Clerk shall forthwith prepare a transcript or video record of the committee hearing, along with all exhibits and minutes of the hearing and committee deliberations and deliver copies to each councillor.

(b) If an appeal is filed by Respondent, action on the committee report and resolution shall be postponed until after the hearing is concluded.

(c) At the first regular meeting of the council after an appeal is filed, the council by simple majority vote of those voting shall decide whether the appeal shall be held on the record of the Ethics Committee hearing or a hearing de novo shall be held. The president of the Council shall schedule such hearing before the Council at a regular or called meeting within 30 days of the filing of the request by Respondent.

(d) If the council schedules a hearing on the record, no additional evidence shall be received at the hearing. The Respondent and Complainant, in that order, shall each have fifteen minutes to present arguments on the appeal.

(e) If a hearing de novo is granted:

- (1) the president may preside, or if he be the Respondent, the vice-president, or may appoint another qualified person to preside, who shall not have vote unless a

Councillor,

- (2) the presiding officer, with consent of the Council, may establish reasonable limits for presentation and closing arguments,
- (3) Complainant shall present evidence to support the statement of allegation and t may be represented by counsel employed by Complainant,
- (4) Respondent may present evidence in response to Complainant's evidence and may be represented by counsel employed by Respondent,
- (5) Complainant and Respondent shall in order be allowed closing arguments, and
- (6) the hearing shall be open to the public.

(f) The Council shall act on the recommendation of the Ethics Committee by adopting the recommendation, modifying the recommendation, or determining that no action be taken.

Sec. 151-1129. Procedural matters.

(a) The general counsel, Complainant or Respondent may request the Ethics Committee to issue subpoenas for the production of documents or attendance of witnesses at the formal hearing, pursuant to IC 36-3-4-24.

(b) The Ethics Committee may grant or deny requests for subpeonas at its discretion.

(c) Should a person fail to comply with a subpoena issued by the committee, the committee shall refer the matter to the Council for enforcement pursuant to IC 36-3-4-24(d).

(d) The Ethics Committee or the Council may at any time table proceedings with respect to a statement of allegation if it finds:

- (1) the prosecutor or other law enforcement agency requests deferring the matter pending investigation or court proceedings, or
- (2) the Respondent is likely to assert a privilege against self-incrimination which would materially affect the Complainant's ability to produce evidence of the alleged ethical violation.